

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 175 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

USHABEN RAMESHWAR PANDIT

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 175 of 1999
MR PM VYAS for the Appellant.
MR ND GOHIL, APP, for the Respondent.
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CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

Date of decision: 08/12/2003

ORAL JUDGEMENT

1. The appellant came to be convicted by learned Additional City Sessions Judge, Court No.10, Ahmedabad, for offences punishable under Section 8(c) read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short), by virtue of a judgment and order pronounced on the 28th January, 1999, in Sessions Case No.120 of 1998. The appellant was alleged to be found in possession of a rexin bag containing 3.350 Kgs. of charas, at about 3.00 P.M. on 19th January, 1998 and the Trial Court, having accepted the prosecution case, recorded conviction and sentenced the appellant to undergo rigorous imprisonment for 10 years and imposed a fine of Rs.1 lakh and directed that, in the event of default in payment of fine, the appellant shall undergo further rigorous imprisonment for a period of one year. Aggrieved by the said judgment and order, the appellant has approached this Court with this appeal.

2. The facts of the case, in brief, can be stated thus:

2.1 Police Inspector, H.K. Chauhan, of Narcotic Cell, C.I.D. Crimes, Ahmedabad, received a secret information on 19th January, 1998, through an informer, that one Ushaben Pandit, aged about 40 to 42 years, with wheat colour complexion and wearing a maroon sweater and blue scarf is to pass by Idgah area at about 15.00 hours with a plastic bag containing narcotics. The said P.I., therefore, reduced this information into writing and made a report of the information to his superior. Thereafter, he summoned two Panch witnesses and explained to them that a watch is to be kept and a raid is to be conducted in connection with the suspected movement of narcotic drugs by a lady. After drawing a preliminary Panchnama, they went towards Shahibaug area, passing by Civil Hospital and Rajasthan Hospital and parked the vehicle in the lane of a hotel and arranged a watch by scattering the raiding team. At about 15.15 hours, a lady was found to be coming from the direction of Agrawal Hotel. She was, therefore, intercepted and her identity was sought. She was told that, before making search of her person or the plastic bag that she was carrying, she can opt to go before a Gazetted Officer or a Magistrate before whom search can be conducted, to which she denied. She was also given an option to take search of the members of the raiding party, to which also she denied. On taking search of the plastic bag carried by her, 12 lumps of brown colour were detected. The same were weighed through Head Constable Jadav and it was found that the

gross weight of the 12 lumps was 3.350 kgs. The lumps smelt of charas. A small piece was drawn from one of the lumps and was tested and was found to be charas. Thereafter, two samples of 25 grams each were drawn from one of the lumps and were put in a plastic bag and heat sealed. The remaining lumps were put in a blue bag and were heat sealed. That bag was again put into a yellow coloured bag and then into a plastic bag. The two samples of 25 grams each, which were drawn, were again packed and tied with thread on all four sides and were sealed with the seal of "P.I., N.D.P.S., S.G.S., CID Crimes". A Seizure Memo was served on the lady, receipt of which was acknowledged by the accused by putting thumb impression. Ultimately, the samples were sent to F.S.L. and the F.S.L. opined that the samples were contraband charas. In the meantime, on finding of the contraband charas, the raiding Officer, H.K. Chauhan, lodged an F.I.R. and arrested the accused. After collecting the material in connection with the offence, charge sheet came to be filed against the accused, Sessions Case was registered and charge came to be framed at Ex.1 in respect of the aforesaid offence of possessing contraband charas to the tune of 3.350 kgs., punishable under Section 8(c) and 21 of the NDPS Act.

2.2 The accused was undefended. She was not following Gujarati language. Therefore, legal aid was provided to the accused-appellant. The accused pleaded not guilty to the charge. Thereafter, the trial commenced. The prosecution has examined six witnesses.

2.3 The Trial Court, after considering the evidence on record and the contentions raised before it, came to a conclusion that the prosecution was successful in establishing the charges against the accused and, ultimately, convicted the accused. Hence, this appeal.

3. Learned Advocate, Mr. P.M. Vyas, appearing for the appellant submitted that the prosecution case suffers from a large number of defects. He submitted that the procedure followed in search and seizure is not legal, proper or just. He submitted that the sampling was not correctly done. He also submitted that the sealing procedure was also not properly carried out. Mr. Vyas submitted that the appellant hails from Uttar Pradesh and, lastly, she came from Bhopal. She is an illiterate lady and never knew Gujarati language. Despite this aspect, the entire procedure of search and seizure is carried out in Gujarati language and the appellant had no opportunity to understand and assess or to react to the procedure undertaken by the Investigating Agency. Mr.

Vyas submitted that the appellant was trapped by one Vinod Dantani, otherwise, she does not know anything about narcotics, she is not involved in it and she has no antecedents. Mr. Vyas has drawn our attention to the material on record to indicate that the Investigating Agency was aware that the appellant is illiterate and that she does not know Gujarati language. Still the entire proceedings were conducted in Gujarati language without explaining anything to the appellant. He submitted that this would be pure and simple non-compliance of requirement of Section 50 because, even if what the prosecution alleges is taken at face value that the appellant was informed of her right of exercising option on being searched before a Magistrate or a Gazetted Officer, she would not understand the same and she would not be in a position to exercise that option. Mr. Vyas, therefore, submitted that Section 50 cannot be said to have been complied in letter and spirit. Compliance of Section 50 has been held to be mandatory and, therefore, the entire search, seizure and resultant conviction would be vitiated.

3.1 Mr. Vyas also drew our attention to several other lacune in the prosecution case and submitted that the appeal may be accepted and the judgment and order recording conviction of the appellant may be set aside.

4. Learned Additional Public Prosecutor, Mr. Gohil, opposed this appeal. He drew attention of this Court to the evidence of Police Inspector, Chauhan, where he denies a suggestion that the Search and Seizure Memo was not explained to the accused. Mr. Gohil was, however, at loss to indicate any contemporaneous material even to suggest that the Investigating Agency was conscious of the right of the accused envisaged under Section 50 of the N.D.P.S. Act and a conscious attempt was made to fulfil the requirement of Section 50 of the N.D.P.S. Act in its true spirit.

4.1 Mr. Gohil submitted that the appellant was found to be in possession of contraband as per Search and Seizure Panchnama supported by evidence of witnesses, including an independent Panch witness, Bai Shantaben Rameshbhai. There is no reason to disbelieve this witness. No animosity is alleged against the Investigating Officer and, therefore, there is no need for him to falsely implicate the appellant. It is suggested that the appeal may be dismissed.

5. We have gone through the record and proceedings before us and have examined the same in light of the

contentions raised before us by both the sides. The prosecution, in all, examined six witnesses and adduced documentary evidence in the form of F.S.L. report, Panchnama, etc.

6. Raiding Officer, P.I., Hasmukh K. Chauhan, is examined at Ex.11. He states about his having received secret information on 19th January, 1998 about Ushaben Pandit to be passing through Idgah area at about 15.00 hours on that day. He says that he had made a written report in this regard, office copy of which is produced at Ex.12 [the original of that report is produced at Ex.30, through witness-Bharatbhai Mafatbhai Chavada (Ex.29)]. The witness then says that, he summoned the Panch witnesses, prepared a preliminary Panchnama and went to the spot indicated by the informant and kept a vigil. The members of the raiding party took scattered positions. At about 15.15 hours, a lady of the description given by the informant was noticed coming with a bag in her hand, who was intercepted and was informed about the secret information and was inquired of her identity. She, therefore, gave her name and address. She was told that, if she so choose, she can be arranged to be taken before a Gazetted Officer or a Magistrate for being searched, to which she denied. She was also offered search of the members of the raiding party, to which also she denied. Thereafter, on opening the plastic bag carried by the lady, a yellow coloured cloth bag with coffee coloured design was found, wherefrom a blue coloured plastic bag containing lumps of dull brown colour were found, weighing 3.350 Kgs. The lumps smelt of charas. There were 12 lumps. A small piece was drawn from one of the lumps and, on being tested, it was found to be charas. From the same lump, two samples of 25 grams each were drawn, placed into a green coloured plastic bag and were heat sealed. The remaining 12 lumps were put into a blue packet and were heat sealed. Thereafter, the samples and the contraband were put into a bag and sealed with the seal of "P.I., N.D.P.S., SGS, CID Crimes". The samples were tied with thread from all four sides. The witness then proceeds to say that the lady was served with a Seizure Memo (Ex.15). He says that the Panchnama in this regard was also drawn on-the-spot, which is at Ex.14. The witness identifies the lady from whom the contraband was found as the accused. The witness then says that he took the accused to the Police Station, lodged the complaint and deposited the muddamal.

6.1 The witness has been cross-examined. Various details are sought from him with a reference to Police

Constable, Vinod Dantani. The witness admits that the accused is illiterate as she has put thumb impression on various occasions. He also states that the accused does not know Gujarati language. He denies the suggestion that the accused does not know Hindi language either. He says that he does not know whether the accused knows to read Gujarati language as he had no such occasion. He denies a suggestion that nothing was explained to the accused. He admits that all the documents of raid were prepared in Gujarati script and language. He also admits that the option under Section 50 was given to the accused by Ex.15, written in Gujarati language. He denies that the Seizure Memo or Arrest Memo as well as the option was not explained to the accused. Against that, he admits that neither in the Arrest Memo nor in the Seizure Memo nor in the option under Section 50 given to the accused in writing, at Ex.15 there is any note that the accused is explained the contents thereof in Hindi, a language understood by the accused. He admits that all the 12 lumps were not tested by them, so also the samples were not drawn from all of them. He states that, all 12 lumps were weighed collectively and a common seal was applied on them. A suggestion that the lady has been falsely roped in is denied.

7. Witness-Vithaldas Pandav is examined at Ex.21. He was a part of the raiding party. He says that the accused could not answer to a question put to her by P.I., Chauhan, as to where she wanted to go. He says that all lumps were identical and, therefore, samples were drawn from only one lump. He also has been cross-examined. He denies the suggestion that the accused was interrogated by P.I., Chauhan, in Gujarati language. But he says that she was interrogated in both the languages.

8. Panch witness-Shantaben Rameshbhai is examined at Ex.22. She says that, she has been summoned as Panch witness on 19th January, 1998 and she went to the place along with other members of the raiding party. She says that the accused was seen at that time with a bag in her hand and the police intercepted her. The witness was asked thrice as to what happened to the lumps found from the accused, but was not able to reply. This witness also has been cross-examined.

9. The other witnesses, Somabhai Mahijibhai (Ex.24), Ranvirsinh Ratansinh Puvar (Ex.26) and Bharatbhai Mafatbhai Chavada (Ex.29) are formal witnesses and nothing substantial emerges from their deposition either to lend support to the prosecution case or to the defence

version.

10. It would be appropriate to note, at this stage, that when the statement of the accused was recorded following framing of charge on 28th May, 1998, the learned Trial Judge has, in terms, observed that the charge was translated to the accused in Hindi language and that the accused represented that she wanted to engage an advocate. Likewise, while recording statement of the accused under Section 313 of the Code of Criminal procedure on 22nd January, 1999 also, the learned Trial Judge, specifically, observed that the accused does not know Gujarati language and, therefore, the questions were translated in Hindi and put to her and her answers given in Hindi language were again translated to Gujarati language. It would also be appropriate to refer to deposition of P.I., Chauhan (Ex.11), where he admits that the accused is illiterate and that she does not know Gujarati language. It is, thus, clear that the accused belongs to U.P. and had come to Gujarat for the first time from Bhopal. She was illiterate. Raiding Officer, P.I., Chauhan, also admits this aspect. The accused has been consistently pleading that she does not know Gujarati language. In our opinion, there is substance in her case that she does not know Gujarati language and that she is illiterate. It is also a matter of record that the entire search, seizure and arrest proceedings were conducted and written in Gujarati language, a language not known to the accused.

10.1 It is the prosecution case that option of being searched in presence of a Magistrate or a Gazetted Officer was given to the accused not only orally, but also in writing (Ex.15). The Arrest/Seizure Memo is prepared in Gujarati, so also Ex.15. It is not the prosecution case that the contents of those documents were either explained in Hindi, the language known to the accused, or explained in any manner, as the accused is illiterate. The contemporaneous record prepared by the prosecution itself does not indicate anything to suggest that the option was offered to the accused in a language known by her or that the option given in writing was translated to her in a language known by her. In our opinion, the option given to the accused, contemplated under Section 50 of the NDPS Act, in a language not known to the accused, is not compliance of requirement of Section 50, as the accused would remain unaware or ignorant of the option of being taken to either a Magistrate or a Gazetted Officer before whom search can be conducted. Therefore, in the instant case, when the record indicates that option was given to the accused in

Gujarati, a language not known to and not understood by the accused, there was non-compliance of mandatory requirement of Section 50 of the NDPS Act. This would, certainly, vitiate the conviction.

10.2 Non-compliance of Section 50 in letter and spirit is conspicuous and apparent from the fact that contemporaneous material is prepared in Gujarati. It is not the prosecution case nor is there evidence to indicate that the contents were explained to the accused in Hindi, a language known to her and, admittedly, it is a fact that the accused is illiterate, non-Gujarati and coming to Gujarat for the first time. The denial to a stray, unwarranted and rash suggestion that contents of Ex.15 were not explained to the accused in Hindi, would not abrogate the other conspicuous material on record. If that suggestion was not made, there would have been no denial and what would have remained on record would be bare fact that the accused did not know Gujarati and the entire proceedings have proceeded in Gujarati, including the offer of option under Section 50 of the NDPS Act. It has never been the prosecution case that contents were explained in Hindi. The contention of Mr. Gohil about this evidence in cross-examination of P.I., Chauhan, therefore, cannot be accepted.

11. Apart from the above important defect fatal to the prosecution case, we have also noticed certain defects in sampling. Though 12 lumps of charas were allegedly found from the accused, samples from only one of the lumps were drawn. The report of F.S.L., therefore, would have only reference only to the samples drawn from that one lump and not to the remaining 11 lumps. Likewise, there is no evidence to indicate as to how, where and by whom the samples were weighed. There is no evidence as to who had actually done the sealing. Be that as it may, the fact remains that the prosecution case suffers from the defect of non-compliance of mandatory requirement of Section 50 of the NDPS Act and, in our opinion, therefore, the Trial Court erred in recording conviction of the appellant. The appeal, therefore, must succeed.

12. The appeal is allowed. The judgment and order recording conviction of the appellant passed by the learned City Sessions Judge, Court No.10, Ahmedabad, on Sessions Case No.120 of 1998, dated 28th January, 1999, is hereby set aside. The appellant-accused is acquitted of the charges for which she was convicted. She be set at liberty forthwith, if not required in any other case. There shall be no change in the order in respect of

muddamaḷ.

[KSHITIJ VYAS, J.]

[A. L. DAVE, J.]

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